STATE OF MICHIGAN

COURT OF APPEALS

EDWIN DEON BROWN and LATISHA BROWN,

Plaintiffs-Appellees,

v

BRECON COMMONS, L.L.C., SALINE PLAZA, L.P., and CHARLES REINHART COMPANY,

Defendants,

and

PHOENIX CONTRACTORS, INC.,

Defendant-Appellant.

UNPUBLISHED
January 28, 2003

No. 233188
Washtenaw Circuit Court
LC No. 98-004864-NO

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant Phoenix Contractors, Inc., appeals as of right from a multi-million dollar judgment entered in favor of plaintiffs following a jury trial in this case involving the liability of a general contractor, Phoenix, for work-place injuries suffered by plaintiff Edwin Deon Brown. We reverse.

I. BASIC FACTS, PROCEDURAL HISTORY, AND GUIDING LEGAL PRINCIPLES

This case presents a very unique set of procedural circumstances. Plaintiffs' action arises from an accident at a construction site, in which Mr. Brown suffered severe injuries when a wall fell on him. Defendant Saline Plaza granted a ground lease to defendant Brecon Commons for the purpose of erecting an office building. The lease was brokered through defendant Charles Reinhart Company, which also served as the project administrator. Brecon Commons hired defendant Phoenix as the general contractor for the construction project. This appeal only involves Phoenix. Phoenix contracted with Damico Contracting (subcontractor), and pursuant to the contract Damico would perform rough carpentry work, which included building and erecting wood frame walls for the office building. Mr. Brown was employed by Damico, and he was a carpenter apprentice on Damico's crew that was responsible for building and erecting the frame walls of the building.

Damico's method of framing and raising walls included building the frames on the ground followed by lifting the walls for placement through the use of mechanical lifting equipment and manual lifting. With regard to the incident at issue, the completed frame was being lifted by a forklift-type piece of equipment [Sky Track] through the use of straps connecting the frame to the forklift. The forklift was then driven forward to pull the wall upward. Mr. Brown, along with other Damico employees, spread out along the length of the wall to provide stability and help lift the wall. As the wall began to rise, a portion of it broke apart and fell on plaintiff.[1] Damico's foreman attached the strap connecting the wall to the forklift, and it was generally agreed that the wall probably broke because of the way the foreman attached the strap. The procedures used to raise the wall allegedly violated rules and regulations of the Federal Occupational Safety and Health Act, 29 USC 651 et seq. (OSHA), and the Michigan Occupational Safety and Health Act, MCL 408.1001 et seq. (MIOSHA), and plaintiffs maintained that it was improper and dangerous to place workers under the wall as it was being raised.

Plaintiffs' complaint alleged negligence against all four defendants, and it included a loss of consortium claim on behalf of Edwin Brown's wife, Latisha Brown. Plaintiffs alleged that Phoenix was negligent for the following reasons:

> 1. Selection, employment, and retention of a careless subcontractor;
>
> 2. Failing to properly supervise and inspect, where it retained control over the work;
>
> 3. Failure to provide adequate protection for construction workers working at the location of the accident, given the circumstances;
>
> 4. Violation of its nondelegable duty to provide plaintiff with a safe place to work; and
>
> 5. Failure to warn plaintiff of hazardous conditions and inappropriate methods of work of which Phoenix was aware, or should have been aware in the exercise of due care.

Plaintiffs' complaint also alleged that the raising of the wall was an inherently dangerous activity. The allegations of negligence against the other defendants mimicked those alleged against Phoenix.

All four defendants filed motions for summary disposition. Phoenix, in its motion for summary disposition brought pursuant to MCR 2.116(C)(10), argued that a general contractor is not ordinarily liable for a subcontractor's negligence, and the exceptions to that rule were not applicable as a matter of law based on the undisputed facts. Phoenix argued, as to the first asserted exception, that raising the wall was not an inherently dangerous activity, and, as to the second asserted exception, that it did not retain control over the subcontractor and framing work [retained control doctrine].

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[1] Discussion of "plaintiff" in the singular refers to Edwin Brown for purposes of this opinion.

The trial court heard all four motions for summary disposition on February 23, 2000, and it ruled from the bench as follows:

> Well, I have looked at your briefs in some detail. I do not find any evidence sufficient to establish or indicate that the general or the subcontractor was carelessly selected.
>
> I also do not believe that there's evidence from which – this particular construction activity would be any more dangerous than any other construction activity, and certainly not to the level where it would be inherently dangerous.
>
> There are control issues that vary as to each of defendants, however. There – I do not believe that there is evidence of a sufficient retention of control as to Brecon Commons, L.L.C., or Saline Plaza Limited Partnership. There are genuine issues of material fact with regard to control by the other two defendants [Reinhart and Phoenix].
>
> Your motion for summary disposition is granted as to Brecon, L.L.C. and Saline Plaza, and denied as to Reinhart and Phoenix. . . .

On March 13, 2000, an order on the trial court's decision was entered, which simply provided that Brecon Commons' and Saline Plaza's motions for summary disposition were granted, and Phoenix's and Reinhart's motions were denied. The order did not distinguish between various theories of liability.

Phoenix and Reinhart then applied for interlocutory leave to appeal, raising the following issue:

> Did the trial court err as a matter of law in finding legally sufficient evidence to support an injured subcontractor employee's claim against a general contractor/project administrator where the injury occurred because of the way the subcontractor performed its job rather than because of some hazardous condition at the work site and where defendants did not retain control over the way the subcontractor performed its work?

Prior to a decision from this Court, trial began and it ran from May 8 through May 12, 2000. The trial court denied defendants' pre-trial motions to adjourn trial pending a decision by this Court.

On May 11, 2000, this Court issued the following order, which was received by the trial court and parties during jury deliberations on May 12, 2000:

> The Court orders under MCR 7.205(D)(2) that the March 13, 2000 order of the Washtenaw Circuit Court is REVERSED to the extent that it denies summary disposition to defendants Phoenix Contractors, Inc. and Charles Reinhart Company for the following reasons. Under the retained control exception to the general rule that an owner or general contractor who hires an independent contractor may not be held liable in negligence to third parties or

> employees of the independent contractor, the owner or general contractor must actually exercise some control over the manner or environment in which the work was performed. Contractual provisions that subject the contractor to oversight, control or supervision are not sufficient in the absence of actual control. *Candelaria v B C General Contractors, Inc,* 236 Mich App 67, 76, 78; 600 NW2d 348 (1999). In this case defendants supervised the work of the contractor at issue in a general sense, and may have been contractually obligated to do more. However, plaintiffs have not shown that defendants exercised any control over the contractor's rough carpentry work, and in particular over the erection of the walls of the building. [*Brown v Brecon Commons, LLC,* unpublished order of the Court of Appeals, entered May 11, 2000 (Docket No. 226244).]

The trial court decided to allow the jury to continue deliberations and render a verdict. The jury found Phoenix negligent and liable for damages in the amount of approximately $23,000,000. The trial court had granted defendant Reinhart's motion for a directed verdict on the basis that there was insufficient evidence to show any control or involvement by Reinhart with regards to Damico and the framing work. Part of Reinhart's argument in its motion for directed verdict was that there was insufficient evidence to establish that the construction job was an inherently dangerous activity. The trial court did not address the argument, but it did grant the motion for directed verdict thereby dismissing the case in its entirety against Reinhart, which necessarily included dismissal of any claim premised on inherently dangerous activity.

Directly after the verdict was rendered, Phoenix moved for a mistrial because of this Court's order reversing the trial court's order concerning summary disposition. The trial court denied the motion because the matter could be addressed through post-trial motions, and the court stated that it had allowed the jury to complete deliberations on the possibility that this Court's order would be reversed or to see how the order related to the issue of inherently dangerous activities. The post-verdict posturing and filings then began in light of the verdict and this Court's order.

Before continuing further with details of the proceedings, it is helpful to note the general principles of law regarding the liability of a general contractor and the instructions given to the jury. Ordinarily, when a general contractor hires an independent contractor [subcontractor] to perform a job, the general contractor may not be held liable in negligence to employees of the subcontractor. *Candelaria v B C General Contractors, Inc,* 236 Mich App 67, 72; 600 NW2d 348 (1999). Case law has carved out three exceptions to the general rule, which are (1) the general contractor retains control over the work done and the subcontractor's activities, (2) the work is an inherently dangerous activity, or (3) reasonable steps within the general contractor's supervisory and coordinating authority are not taken to guard against readily observable, avoidable dangers in common work areas that create a high risk to a significant number of workmen. *Plummer v Bechtel Constr Co,* 440 Mich 646, 659, 666; 489 NW2d 66 (1992); *Candelaria, supra* at 72; *Johnson v Turner Construction Co,* 198 Mich App 478, 480; 499 NW2d 27 (1993); *Samodai v Chrysler Corp,* 178 Mich App 252, 255; 443 NW2d 391 (1989). Michigan does not recognize a legal duty requiring employers to exercise care in the selection and retention of an independent contractor. *Reeves v Kmart Corp,* 229 Mich App 466, 476-477; 582 NW2d 841 (1998).

The jury was only instructed on the doctrines of inherently dangerous activities and retained control, not negligent hiring or selection of subcontractors and not on readily observable dangers in common work areas. Plaintiffs agree that no claim was presented to the jury premised on an independent cause of action for negligent hiring or selection. Plaintiffs argue, in part, that the exception for readily observable dangers in common work areas is applicable and supports the jury's verdict. However, the jury was not instructed on this exception, and the trial court specifically rejected any such instruction wherein it stated: "Plaintiff[s] requested a special instruction with regard to readily observable conditions and I'm not giving that instruction." Plaintiffs have not filed a cross appeal challenging the jury instructions.

Returning to the proceedings, both parties filed motions for rehearing in this Court following the verdict. On June 15, 2000, this Court issued its order on the motions, and the order provided:

> This case is REMANDED under MCR 7.205(D)(2) and 7.216(A)(7) to the Washtenaw Circuit Court, which shall file with this Court within 14 days of the Clerk's certification of this order a concise written explanation of its reasons for submitting to the jury theories of liability regarding inherently dangerous activities and/or negligent selection of contractors as against defendants Phoenix Contractors or Charles Reinhart Company, after the court appears to have granted summary disposition to defendants Brecon Commons L.L.C. and Saline Plaza Limited Partnership on both these theories of liability by order of March 13, 2000.
>
> The motions for rehearing are HELD IN ABEYANCE pending review of the circuit court's explanation. [*Brown v Brecon Commons, LLC*, unpublished order of the Court of Appeals, entered June 15, 2000 (Docket No. 226244).]

On June 23, 2000, the trial court issued its "opinion on remand" to address the questions posed by this Court.

> This Court had earlier granted summary disposition to defendants Brecon Commons L.L.C. and Saline Plaza Limited Partnership because there was no evidence that either of those entities ever had anything to do with the conditions on the site, the activity involved in lifting the large wall frame with a strap while several carpenters were placed under it, or the selection of the carpentry subcontractor. It appeared to the Court that those two defendants were in effect "silent partners" in the complicated ownership of the site but had no involvement with the construction process or the subcontractor selection process. It was apparent that the general contractor had primarily made those decisions. There was some evidence presented in response to the summary disposition motion that Reinhart as the project administrator had also played a role in that process and the motion was denied as to defendant Reinhart. During trial, however, that evidence did not get presented and the Court held that there was insufficient evidence from which the jury could find that defendant Reinhart was involved in those processes and granted a directed verdict. The evidence presented at trial was sufficient for the jury to find, as it did, that defendant Phoenix negligently hired the subcontractor Damico, that the process of lifting the wall with a hi-lo and a nylon

> strap suspended over several carpenters below was an inherently dangerous activity, and that Phoenix had retained control over safety on the contract site.

We note that the jury was not instructed on negligent hiring or selection, and the trial court's earlier statements at summary disposition specifically indicated its belief that there was no evidence that the subcontractor was carelessly selected. As far as retained control, this Court clearly ordered the dismissal of any claim premised on that theory.

This Court responded by simply denying the motions for rehearing, thereby allowing its previous order to stand. *Brown v Brecon Commons, LLC*, unpublished order of the Court of Appeals, entered July 13, 2000 (Docket No. 226244). Phoenix subsequently filed a complaint for superintending control with this Court seeking enforcement of the order reversing the trial court's ruling denying Phoenix's motion for summary disposition. This Court dismissed the complaint because Phoenix had an adequate remedy at law in the form of an appeal by right. *Phoenix Contractors, Inc v Washtenaw Circuit Judge*, unpublished order of the Court of Appeals, entered November 9, 2000 (Docket No. 230485).

It appears that both parties filed applications for leave to appeal in the Michigan Supreme Court in relation to this Court's order reversing summary disposition regarding Phoenix and the subsequent denial for rehearing on the matter. Our Supreme Court ruled:

> [P]ursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we STAY enforcement of the trial court judgment pending the decision of the Court of Appeals on any review concerning that judgment and, if applicable, until this Court acts on a subsequent timely application for leave to appeal from any such decision by the Court of Appeals. In the unique circumstances of this case, we are not persuaded that plaintiffs should be allowed to enforce their judgment pending the completion of appellate review. [618 NW2d 765 (2000).]

In the trial court, Phoenix's motions for JNOV and new trial were denied, but its motion for remittitur was granted, and the ultimate judgment entered on February 27, 2001, awarded Edwin Brown $10,331,335 and Latisha Brown $3,467,989 in damages.

II. ANALYSIS AND CONCLUSION

The law of the case doctrine is implicated in the case before us today, albeit in a rather unusual set of circumstances. Stated generally, the law of the case doctrine provides that if an appellate court decides a legal question and remands the case for further proceedings, not only is the lower tribunal bound by the appellate court's decision, but the appellate court is similarly bound in that the legal issue previously determined will not be resolved differently upon subsequent appeal in the same case where the facts remain materially the same. *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000). The doctrine primarily seeks to maintain consistency and to preserve finality of judgments by avoiding reconsideration of issues once decided during the course of a single, continuous lawsuit. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine, however, will not apply where there has been an intervening change in the applicable law. *Id.*

Here, this Court's order of May 11, 2000, reversing the trial court's ruling on Phoenix's motion for summary disposition is part of the law of the case, and it remains the controlling law in light of the fact that motions for rehearing were denied, and the Supreme Court's ruling did not reverse the order, but simply stayed enforcement of the judgment pending our review of the matter.

The May 11, 2000, order of this Court could conceivably be viewed as an order granting summary disposition to Phoenix in the entirety as there is no limiting language contained in the order.[2] At a minimum, the order disposes of any claim predicated on "retained control." With regard to inherently dangerous activity, the trial court apparently found that there was no inherently dangerous activity when initially ruling from the bench on the motions for summary disposition. It would be unreasonable to conclude that the finding applied to only some of the defendants. Either the act of framing and raising the walls was inherently dangerous or it was not. The trial court, responding to this Court's order seeking an explanation for the instruction to the jury on inherently dangerous activity, merely stated that there was evidence supporting the theory. However, the case against Reinhart was dismissed on directed verdict, which necessarily included dismissal of the any claim based on inherently dangerous activities.

Regardless, even if we address the issue anew, the framing and raising of walls for an office building is not an inherently dangerous activity. Under the doctrine, liability may be imposed when the work contracted for is likely to create a peculiar risk of physical harm or if the work involves a special danger inherent in or normal to the work. *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 548; 536 NW2d 221 (1995). Liability should not be imposed where a new risk is created in the performance of the work, and where the activity was not unusual, the risk was not unique, and reasonable safeguards against injury could readily have been provided by well-recognized safety measures. *Id.* at 549. In *Rasmussen*, the deceased was killed when hanging scaffolding collapsed beneath his feet as he was bolting metal siding to the frame of the building. *Id.* at 544. The accident was caused when a rope holding the scaffolding snapped. *Id.* This Court concluded:

> In this case, we agree with defendant Lake Shore that the inherently dangerous activity doctrine does not apply to the instant facts. Contrary to plaintiffs' assertion on appeal, the dangerous activity undertaken was the decision to forgo the use of steel cables, not the use of hanging scaffolding. The activity recognized by defendant Lake Shore to be performed by plaintiffs involved the fairly routine task of constructing a multistory building using hanging scaffolding. [*Id.* at 549.]

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[2] Because the written order denying summary disposition to Phoenix did not contain any language indicating that summary disposition was granted in part as to certain theories of liability, it is arguable that all theories of liability survived summary disposition. A court speaks through its judgments and orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Thus, when Phoenix filed its interlocutory application for leave to appeal on the issue of retained control, and this Court ruled on that issue, the other theories of liability conceivably survived.

Here, the same can be said because the framing and raising of walls is a fairly routine task as part of constructing a building, and it was the negligent manner in how the wall was raised that caused the injury.

As noted above, any theory premised on readily observable dangers in common work areas was not instructed on, and it was specifically rejected by the trial court. Plaintiffs do not challenge the jury instructions. Moreover, the theory applies "where employees of a number of subcontractors were all subject to the same risk or hazard." *Hughes v PMG Building, Inc,* 227 Mich App 1, 8; 574 NW2d 691 (1997). The *Hughes* panel stated:

> [W]here a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will "render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." [*Id.* at 8-9 (citation omitted; omission in original).]

Here, the risk was only to employees of subcontractor Damico as they manually raised the wall from a precarious position underneath the wall.

Plaintiffs argue that the central question is whether a general contractor, having hired a subcontractor who it knows always lifts walls in a reckless and dangerous manner in violation of state and federal law, has a responsibility to either intervene and stop the subcontractor from performing the wall raising in such a manner, or to at least see whether the forklift operator was adequately trained. This does not fit directly into any of the recognized exceptions, and appears to be a hybrid between negligent hiring/selection and the three recognized exceptions, all of which cannot be applied here for the reasons already stated in this opinion.

Finally, plaintiffs cite MIOSHA and OSHA rules and regulations that were allegedly violated and upon which the jury was instructed in considering whether Phoenix was negligent, and which require, in part, that both contractors and subcontractors be responsible for protecting workers against workplace hazards. Although these provisions may support penalties and fines through MIOSHA and OSHA, plaintiffs cite no authority for the proposition that violations of these acts create additional and separate exceptions to the general rule precluding the civil liability of contractors for injuries suffered by employees of subcontractors. In fact, OSHA and MIOSHA provisions contain language to the contrary. MCL 408.1002(2) provides:

> Nothing in this act shall be construed to supersede or in any manner affect any workers' compensation law, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

OSHA contains essentially the same provision. 29 USC 653(b)(4). Therefore, MIOSHA and OSHA do not enlarge or affect the exceptions to the general rule concerning contractor liability that were created through case law, or in other words, the common law. See *Ghrist v Chrysler,* 451 Mich 242, 251; 547 NW2d 272 (1996).

Reversed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh